ABD. GHAPUR HJ. SALLEH

v.

TUN DATUK HJ. MOHD. ADNAN ROBERT TYT YANG DI-PERTUA NEGERI SABAH & ORS.

HIGH COURT BORNEO, KOTA KINABALU
ABU MANSOR ALI J
[ORIGINATING SUMMONS NO. 27 OF 1986]
20 MARCH 1986

CIVIL PROCEDURE: *Injunction - Interim injunction - Whether there were triable issues - Whether members of the Election Commission government were officers - Whether s. 29(2) Government Proceedings Ordinance applies - Whether plaintiff has locus standi - Balance of convenience - Application by the plaintiff for an interim injunction against the 3rd to the 7th defendants - Members of the Election Commission - To restrain them for acting under Article 113 of the Federal Constitution until the hearing and disposal of the main summons brought by the plaintiff - Application by originating summons seeking amongst other things a declaration that the Instrument of Dissolution, dissolving the Sabah State Legislative Assembly issued by the 1st defendant in his capacity as the Yang di-Pertua Negeri Sabah was null and void and of no effect.*

In order to establish that there was a triable issue to justify the application for the injunction the plaintiff asserted on the seriousness of the question to be tried in the main action i.e., the constitutionality of the action of the 1st and 2nd defendants in dissolving the Sabah Legislative assembly. Whether in dissolving the Assembly the 1st defendant had acted on the 2nd defendant's advice and if so whether it is an abdication or surrender of discretion by the 1st defendant. The plaintiff also raised the question whether the act of dissolving the State assembly when the issue as to who was the real Chief Minister had yet to be resolved by the Courts was a breach of the separation of powers which is an encroachment by the Executive upon the judicial function and is therefore void. Finally, whether the Election Commission is under constitutional duty to act upon any proclamation of dissolution or only on a valid and constitutional dissolution.

Counsel for the 3rd to 7th defendants submitted that an injunction is not available to the plaintiff on the ground that under s. 29(2) of the Government Proceedings Ordinance no injunction could be granted against an officer of the Government if the effect of granting the injunction would be to give relief against the officer which would not have been obtained in proceedings against the government. It was also submitted that the originating summons disclosed no cause of action against the 3rd to 7th defendants.

Counsel for the 1st and 2nd defendants submitted that the plaintiff lacks the *locus standi* since he is a stranger and had no genuine interest in the suit.

Held:

[1] The Court held that no interlocutory injunction be issued against the 3rd to 7th defendants since there are no triable issues on the following grounds:

(a) In exercising his discretionary power under Article 10(2), the 1st defendant is not debarred from consulting anyone and obtaining the best advice and in doing so the 1st defendant is in no way abdicating or surrendering that discretion.

(b) The dissolution of the Legislative Assembly of Sabah by the 1st defendant under Article 21(2) of the State Constitution is a legislative act and not an executive act and that is consistent with the 1st defendant's position under Article 13 which provides that the legislature of the State shall consist of the 1st defendant and the Legislative Assembly. Since the act of dissolution is a legislative act, there was therefore no encroachment of the Executive upon the judicial function.

(c) Since the act of dissolution by the 1st defendant was a valid act, the 3rd to 7th defendants had no choice but to act upon the proclamation.

[2] On the balance of convenience issue, there is a need to consider public interest. The Court took judicial notice that the issue in the main action will not be resolved within the 90 days allowed to the Election Commission to hold the election and the proclamation until it is finally declared null and void has to be presumed to be valid. If in the meantime the injunction is granted against the 3rd to 7th defendants they will be dragged in uncertainty. If the plaintiff fails in the main action subsequently the 1st and 2nd defendants and the people of Sabah would have lost the opportunity of taking part in a lawful election. The plaintiff would have gained the relief that he would be able to obtain in the main action. The public interest therefore outweighs the plaintiff's and this application can only result in the refusal to grant the relief sought for.

[3] The 3rd to 7th defendants are officers under the Government Proceedings Ordinance since they are in the employment of the Federal Government and therefore under s. 29(2) of the Government Proceedings Ordinance 1956, no injunction can be given against the government.

[4] The plaintiff has the *locus standi* to bring the action since he was a member of the Sabah State Assembly who is directly affected by the proclamation dissolving the State Assembly.

Cases referred to:
Tengku Hj. Jaafar & Anor. v. Government of Pahang [1978] 2 MLJ 105
Tio Chee Hing v. Government of Sabah [1981] 1 MLJ 207
NWL Ltd. v. Woods [1979] 3 All ER 614
Cayne & Anor. v. Global Natural Resources [1984] 1 All ER 225
Smith v. Inner London Education Authority [1978] 1 All ER 411
Cormack v. Cope & Anor [1974] 131 CLR 432
Hoffman - La Rouche v. Secretary of State for Trade & Industry [1975] AC 295

Legislation referred to:
Chief Minister (Incorporation) Ordinance, s. 5
Elections Commission Act 1957, s. 7
Evidence Act 1950, s. 114
Federal Constitution, art. 113
Government Proceeding Ordinance 1956, ss. 29, (1), (2)
Penal Code, s. 21
Rules of the High Court 1980, O. 12 r. 7, O. 18 r. 19
Rules of the Supreme Court 1957, O. 25 r. 4
Constitution of the State of Sabah, arts. 10(1), (2), (2)(b), (4), 13, 21(2), (4)

For the plaintiff - Gopal Sri Ram (Dr. Yaacob Hussain Merican and Dr. Tunku Sofia Jewa with him); M/s. Hj. Mohd. Noor, Dr. Yaacob & Ismail
For the 1st & 2nd defendants - Anthony Lester Q.C. (Dominic Puthucheary and Josie D. Bosi with him)
For the 3rd to 8th defendants - Mary Lim Thiam Suan, FC

JUDGMENT

Abu Mansor Ali J:

By his originating summons dated 1 March 1986, supported by his affidavit sworn on 28 February 1986, the plaintiff applied for four declaratory reliefs as follows:

(1) That the Instrument of Dissolution dated 24 February 1986, executed by the 1st defendant dissolving the Sabah State Legislative Assembly (announced by the 2nd defendant on 26 February 1986) is null and void and of no effect.

(2) That the Sabah Legislative Assembly has not been dissolved notwithstanding the acts of 1st and 2nd defendants.

(3) That notwithstanding the purported dissolution referred to in Prayer 1, the Sabah State Legislative Assembly continues.

(4) That the 3rd, 4th, 5th, 6th, 7th and 8th defendants are not entitled to act under Article 113 of the Federal Constitution and call or conduct a general election under Article 21(4) of the Sabah Constitution.

By *ex parte* summons-in-chambers of even date the plaintiff also applied to restrain the 3rd to 8th defendants by himself or by any person acting on his behalf or from acting under Article 113 of the Federal Constitution upon the Proclamation of Dissolution until the hearing and disposal of the main summons. The summons-in-chambers came up for hearing on 1 March 1986, and I ordered that all defendants be served and adjourned it to 12 March 1986 for full arguments in Chambers.

The plaintiff's application for the injunction is supported by the plaintiff's second affidavit (2A) sworn on 28 February 1986. In para. 4 of (2A), the plaintiff gave four grounds in applying for the interim injunction against the 3rd to 8th defendants. They are:

(a) There is a serious question to be tried in the main action. Under this heading the plaintiff alleged that the issue raised in the main originating summons is the constitutionality of the actions of the 1st and 2nd defendants in dissolving the Sabah Legislative Assembly. Plaintiff contended that the dissolution or purported dissolution of the Legislative Assembly announced on 26 February 1986 is null and void and of no effect. That being so the plaintiff says that the 3rd to 8th defendants are therefore not bound to act on that declaration of dissolution. The plaintiff's Counsel urged on the Court to find that there are raised several factual issues whether the 1st defendant was advised by the 2nd defendant to dissolve the Assembly. As evidenced, he says, by paras. 5 to 7 in enclosure. (7), the affidavit sworn by the 1st defendant, the 1st defendant says he was advised and requested whereas as reported, in "AGHS-8" in encl. (3), a press release by the 2nd defendant, no mention was made of any request. Plaintiff's Counsel urged on this Court to consider the importance of this fact in view of the requirement of the Sabah State Constitution, Article 10(1) that 1st defendant should act on advice in the exercise of his functions under the Constitution and that the 1st defendant may exercise his discretion only in Article 10(2)(b) and Article 10(4) thereof. Learned Counsel further urged that there has in fact been admission by the 1st defendant he had acted on the 2nd defendant's advice.

(b) The next serious question to be tried according to plaintiff's Counsel is a question of law. If the 1st defendant has a discretion whether to accede to a request to dissolve but instead acted on advice it becomes a case of abdication or surrender of discretion, plaintiff's Counsel urged.

(c) Thirdly, whether in dissolving the Sabah Legislative Assembly while the issue who is the real Chief Minister (in Civil Suit No. K. 467 of 1985 - judgment on 15 April 1986) is still under a cloud amounts to a breach of the doctrine of the separation of powers - an encroachment by the Executive upon the Judicial powers of the Federation and consequently plaintiff says void.

(d) Then fourthly, whether the Election Commission is under a constitutional duty to act upon **any** proclamation of dissolution or only a valid and constitutional dissolution. These issues, the plaintiff's Counsel submit merit mature consideration, require argument and careful consideration and are matters not to be summarily dismissed.

As the application was primarily directed against the 3rd to 8th defendants, though affecting the rights of the 1st and 2nd defendants, Counsel for the 3rd to 8th defendants was asked to reply first. In the course of her submission, Miss Mary Lim, Counsel for 3rd to 8th defendants, correctly pointed out that the 5th defendant is not a member of the Commission. On her application, and conceded to by the plaintiff's Counsel, the summons against the 5th defendant was struck out with costs to him and the Court substitutes the 5th defendant to 7th defendants for 6th to 8th respectively.

Counsel for the 3rd to 7th respondent submitted that an injunction is not available to the plaintiff on the ground that under s. 29(2) of the Government Proceedings Ordinance no injunction could be granted against an officer of the Government if the effect of granting the injunction or making the order would be to give relief against the officers which would not have been obtained in proceedings against the government.

She referred the Court to the definition of "officer" in the definition section of the said Ordinance which in relation to government includes (emphasis is mine) **a person in the permanent or temporary employment of such government which includes Federal or State Government.** She also referred us to s. 7 of the Election Commission Act (Act 31), Bundle (D4), pp. 54 and 55, where the members of the Election Commission are deemed to be a public servant within the meaning of the Penal Code. Also referred to is the Ninth Description in s. 21 of the Penal Code as to what a "public servant" denotes and also to the definition of officer in the Interpretation and General Clauses Ordinance 1948, as meaning a person in the permanent or temporary employment of any government. She urged on the Court by analogy the Judges of the High Court like the members of the Commission can also be regarded as "officers" of the government though both having been appointed by the Sovereign, both independent of each other and of the government - the Executive having no right to give instruction to either of them.

In the present application, she submitted, it was unlike an application directly against the government as in *Tengku Hj. Jaafar & Anor. v. Government of Pahang* [1978] 2 MLJ 105 when it was said injunction could be granted but not granted therein against the government. The plaintiff's application coming under s. 29(2), of the Government Proceedings Ordinance, a stricter provision than s. 29(1), cannot be granted as s. 29(2) prohibits the Court from granting any injunction against an officer of the Government if the effect of which is to give relief against the government which the plaintiff could not have obtained against the government. Counsel cited authority No. 1 to No. 4 in Bundle D4 in supporting her argument that no such injunction can be obtained.

In the course of the argument learned Counsel for the 3rd to 7th defendants also applied for the originating summons against them be struck out as, she submits, the summons discloses no cause of action against them for other than identifying them as defendants there are no

paragraphs or pleadings against them. Counsel claimed she was entitled to make the oral application under O. 12 r. 7 of the Rules of the High Court. She went on to submit such an action had been taken in the case of *Tio Chee Hing v. Government of Sabah* [1981] 1 MLJ 207 and a similar order was given in Federal Court Civil Appeal No. 274 of 1984. She submitted as no cause of action is disclosed the originating summons against the 3rd to 7th defendants ought to be struck out.

Mr. Lester for 1st and 2nd defendants submitted that although primarily the injunction sought is against the 3rd to 7th defendants nonetheless it cannot be denied that if granted the effect in substance is tantamount to a mandatory interlocutory injunction against the 1st and 2nd defendants; in effect setting aside the proclamation for dissolution which order the plaintiff could not have against the 1st defendant or 2nd defendant. Mr. Lester also made a few other preliminary observations to the effect that on the serious triable issues the Court in applying the *American Cynamid Ethicon* principle may have regard also to special or special factor cases in which the degree of probability of success of the plaintiff's claim as a factor to be weighed in the balance of convenience or in the public interest or that of justice consideration. (See *NWL Ltd. v. Woods* [1979] 3 All ER 614 and *Cayne & Anor. v. Global Natural Resources (Privy Council)* [1984] 1 All ER 225 and *Smith v. Inner London Education Authority* [1978] 1 All ER 411).

On the question of whether the 1st defendant was entitled to treat the 2nd defendant as the Chief Minister as regards the dissolution of the Legislative Assembly Counsel for the 1st and 2nd defendants submitted that it is not a serious triable issue to be tried because plaintiff lacks the *locus standi* to be so retried. To order so would only result in duplicity as that issue had been fully canvassed before my bother, Datuk Tan Chiaw Thong J.

There remains only the alleged "delayed dissolution issue" which he submitted is not seriously triable since the two days' delay in announcing the 1st defendant's decision to dissolve the Assembly cannot be said to have prejudiced the plaintiff as 90 days is allowed by the State Constitution. In reply to Mr. Sri Ram's allegation that the 1st defendant acted on advice or discretion and there is conflict of evidence, Mr. Lester submitted no such conflict exist. From 1st defendant's affidavit (7), paras. 6, 7 and 16, it was clear, he submitted 1st defendant did not act on advice alone but in fact from enclosure. (9) it was advice and request. The 2nd defendant said he advised and requested while 1st defendant says he acted under Article 10(2) and Article 21 independently and not acting under the advice of 2nd defendant.

In reply to what the plaintiff submitted under the heading A item 2 of his written submission on the question to be tried, if the dissolution was the 2nd defendant's decision, Mr. Lester submitted there was no evidence before the Court to support the allegation that the 2nd defendant advised the 1st defendant to dissolve the Sabah Assembly in order to defeat plaintiff's claim in Civil Suit No. K. 467 of 1985 (para. 6 at p. 88 of Abu Mansor Ali J's judgment referred to). It was further contended that it was a mere allegation that the 1st defendant acted as a rubber stamp. Mr. Lester says the only evidence if at all as to rubber stamp is the press release, "AGHS-8" in encl. (3).

As to the issue whether 1st defendant was entitled to treat 2nd defendant as Chief Minister when his appointment is still under a cloud reverted to in the plaintiff's submission under the heading A item 3, Mr. Lester answers that the 2nd defendant's gazetted appointment under s. 5 of the Chief Minister (Incorporation) Ordinance and by s. 4(3) of the Evidence Act 1950 (read with s. 5 of the said Ordinance) in the absence of bad faith or misconstruction of 1st defendant's powers is conclusive proof of his appointment. No evidence shall be allowed to disprove that the 2nd defendant's appointment was duly made. This is coupled

by the fact that at the time of dissolution no Court had finally determined that 2nd defendant is not Chief Minister and he also submitted that it is to be presumed that official and judicial acts are rightly and regularly performed. Apart from example (E) to s. 114, Mr. Lester also cited the judgment of Lord Diplock in *Hoffman-La Roche v. Trade Secretary* at pp. 101 and 102 of Bundle (B) D2 stating there is a presumption in favour of an order's validity prevailing so long as there is no final judgment in that action to the contrary.

Mr. Sri Ram's citation of CJ Barwick's statement that the act of dissolution was an Executive act (p. 118 of Bundle (P1)), Mr. Lester pointed to the Court that CJ Barwick's statement was a minority statement whereas the majority view that it was Legislative is at pp. 481 and 472 of that case and in the judgment of Menzies J at p. 461 and that of Gibbs J at p. 467.

As for the allegation of usurpation of the Court's powers in particular my brother, Datuk Justice Tan Chiaw Thong J's decisions, Mr. Lester submitted there is no usurpation. In dissolving the Legislative Assembly of the State of Sabah the 1st defendant was acting in his own sphere and in Datuk Tan J deciding the issue of facts and law which had been placed before him he would be deciding within his jurisdiction with powers to reward the winner and punish the loser. If the plaintiff in that main case succeeds his reputation and the reputation of his witnesses will be vindicated. If however the defendant succeeds the 1st and 2nd defendants and their witnesses will be vindicated. It is not denied, he says, that the holding of an election may deny the plaintiff in that case (Tun Mustapha) from being Chief Minister if the order of the Court says so but he may be still so by the peoples' vote. It has happened that an Executive act or Legislative may deprive the fruits of proceedings but it is not usurpation. He cited a few instances such as *Government of Malaysia v. Zainal's* case at p. 352, Bundle A (D1), *Burma Oil* case and *K.C. Cheah v. Petronas*. Mr. Lester also commented that it is unmeritorious on plaintiff's part to make this application as Tun Mustapha as the person alleged to be affected did not proceed with the appeal and did not join the plaintiff to seek relief. He submitted that the 1st defendant was fully entitled to treat 2nd defendant as Chief Minister and referred to enclosure. (9), para. 4.

As to Ground 5 of the plaintiffs submission, Mr. Lester submits that as other points will not merit serious triable issues so Ground 5 would also not arise. He submits that on all grounds there are no serious questions to be tried based on the *American Cynamid* test.

Lastly Mr. Lester questioned the *locus standi* of the plaintiff to bring this suit. He cited *Tan Sri Hj. Othman Saat's* case at p. 115A of (P1). He submitted the plaintiff is a stranger and had no genuine interest and the Court has been urged to consider that authority.

On the question of balance of convenience, Mr. Lester submitted that the application of the *American Cynamid* is qualified by two important considerations of the "special cases". The Court should evaluate the respective merits of both parties. Will the grant of an interlocutory injunction finally and effectively decide the originating summons itself?

He submitted that the present application comes into the "special case" and the Court should consider the balance - the likelihood whether the plaintiff would succeed bearing in mind the time factor of 90 days for the Election Commission to hold election. If the plaintiff is granted the interlocutory injunction it will finally decide the originating summons for the reason that one of the premises on which this injunction is founded is the allegation that the 2nd defendant is not the lawful Chief Minister. This question had been canvassed in full in the trial before Datuk Tan Chiaw Thong J having taken 3½ months comprising 500 pages of submissions and 1000 pages of written evidence. Counsel submitted that it is unreasonable

and unrealistic to say that the issue would be resolved before Datuk Tan J's judgment on 15 April 1986. In the case of the Election Commission he submitted that the protracted Court hearing including appeals will make it impossible for the Election Commission to hold the election within the 90 days as proclaimed. If granted plaintiff would have had all the relief obtained in the main action as it would then have effectively prevented the Election Commission from performing its work. Counsel cited *NWL Ltd. v. Woods* [1979] 3 All ER 614 Bundle D2 pp. 127, 128 and 133 and there would be nothing more left for the 1st and 2nd defendants to proceed to trial.

Mr. Lester submitted that in the *Cayne v. Global Natural Resources* [1984] All ER 25 case type p. 108 and p. 115 of (D2) balance of convenience would not longer have to be weighed. The test is what can the Court do in its best endeavour to avoid injustice? Counsel submitted that in the present case the *Cayne* and *NWL* type of consideration would apply.

Mr. Lester also submitted if the Court rules against him on the above submissions he refers to paras. 27 and 28, enclosure (7), which enumerates the reason why on a balance of convenience is against granting the relief prayed for.

In deciding whether to grant this relief Counsel also submitted that the Court is to weigh public interest as was done in *Smith v. Inner London Education Authority* [1978] 1 All ER 411 since the plaintiff is seeking an injunction against a public authority to prevent it from performing its public duty the consideration need not only be a balance of convenience but also the wider public interest of good government and the stability of the State Government of Sabah. One factor of weighing in the public interest he submitted is the discretionary power vested in the 1st defendant. He has explained why he dissolved. In considering balance of convenience this should weigh heavily against granting relief and would be reluctant to grant one as plaintiff had not suffered damage. He submitted that as regards plaintiff wanting to preserve the *status quo* he did not seek to preserve the *status quo* but *status quo ante*, the position before the proclamation.

Finally Mr. Lester submitted that the plaintiff's application for an injunction is affected by laches not in the sense that he was late in his application but that the plaintiff had acquiesced to the 2nd defendant's appointment as Chief Minister since 22 April 1985. In enclosure 9, para. 9, it is alleged that the plaintiff had acquiesced and supported him. Plaintiff had never shown that 2nd defendant was not the Chief Minister and that the 1st defendant would not regard him as one. He submits that this is another reason why the interlocutory relief should be refused.

Mr. D. Puthucheary on behalf of the 1st and 2nd defendants submitted that he adopted submission of Counsel for the 3rd to 7th defendants relating to jurisdiction of the Court to grant injunction under s. 29 of the Government Proceedings Ordinance. He stressed that the word "government" and "officer of government" was capable of larger concept and wider interpretation and not limited to officers in the Executive position only. Mr. Puthucheary also submitted that the reason for the Federal Court allowing the appeal of the Federal Counsel in the Federal Court Civil Appeal No. 274/84 was that no injunction could be issued against a government or the process of government. In the present case although the date for election had not been fixed but the Election Commission, as in enclosure (6), Exhibit "JDB1", had stated that election would be about 10 or 11 May. He also drew a difference in the filling of a casual vacancy by the 3rd to 7th defendants as opposed to the situation following a dissolution which shall be filed by 90 days.

In reply Mr. Sri Ram submitted that as to the 3rd - 7th defendants' Counsel's application to have the summons struck out she should have applied by summons in order to give the plaintiff notice and as for the cause of action the originating summons is the pleadings. He relies on enclosure (2A) why the injunction is sought principally against 3rd - 7th defendants since they should not act on an invalid dissolution. They cannot enquire but the Court can do so and grant an injunction until the question is resolved.

On jurisdiction to grant injunction Mr. Sri Ram submitted it is available against the government and for "government" we have a definition and whether the Election Commission members are officers of government or a part of government is an open question. In reply Mr. Sri Ram touches the five grounds he relied are not the only grounds but are part of his grounds. Essentially the plaintiff's case is that he is an Assemblyman and he is seeking a declaration that the Assembly had not been constitutionally dissolved by acting on an advice of a Chief Minister whose title is disputed. Then whether the proclamation is valid. Briefly what the plaintiff contends as well is that the dissolution is a nullity due to date of announcement and fettering of discretion and discretion is invalid.

Mr. Sri Ram drew a distinction between those cases such as the *Burma Oil* case, *Government v. Zainal Hashim's* case - Bundle D1 p. 352 *supra*, and *K.C. Cheah v. Petronas* in that those cases were cases where a party's right had been destroyed by a Legislative act. In the present case, plaintiff is taking a challenge that the dissolution is void. As for unmeritorious allegation what plaintiff is saying is that the 1st defendant has no power to grant a delayed dissolution and he had abdicated his discretion. As for the objection to plaintiff's *locus standi* Mr. Sri Ram submitted his client was the Assemblyman and he is entitled to say that the Assembly still subsists - and not dissolved. On balance of convenience and allegation if granted there will be left nothing to try the prime consideration should be to prevent the 3rd - 7th defendants from proceeding on an unconstitutional dissolution and plaintiff alleges what is supreme is observation of the Constitution and abiding by the law. As for the allegation of laches plaintiff did not come then because he did not have the evidence of a dissolution - it was then speculative. Plaintiff submits that he has made out a *prima facie* case for an injunction.

Conclusion

Firstly before anything else I would like to clear the oral application made by Counsel for 3rd - 7th defendants to have the originating summons struck out against them. I refer the Counsel's application. It is clear under the order sought by her such application should be made by summons for reason that the plaintiff should have notice of such a serious step being taken against him. Indeed in the case quoted by learned Counsel the application made was under O. 25 r. 4 of the Rules of Supreme Court 1957 which now is O. 18 r. 19 of the current High Court Rules 1980. As for Counsel's contention that there was absence of pleadings I agree with plaintiff's Counsel that Prayer 4 of the Originating Summons enclosure (1) is the pleadings - the declaration the plaintiff is seeking. The 1st and 2nd defendants raised the question of *locus standi* of the plaintiff to bring this action and the question of laches. On the question of *locus standi* I agree with the submission of plaintiff's Counsel that he has one since he was a member of the Sabah State Assembly directly affected by the proclamation dissolving the State Assembly which he applies to be declared void. He is affected by the order of dissolution directly.

On the question of laches as was pointed out by Mr. Lester, Counsel for 1st and 2nd defendants, it is not laches in bringing this action late that is complained of by the plaintiff but it is delay in bringing the issue of 2nd defendant's title to the office and he acquiesced

to his appointment on plaintiff's part and in blowing hot and cold in respect of his support for him. As my decision on this application for the injunction turns on other points I find it not necessary that I should decide on the matter raised.

On the delayed dissolution issue I agree with Mr. Lester's submission bearing in mind that election could take place in 90 days, that no injustice is caused to anybody by a delay of two days.

Before I proceed to discuss the substantial application for injunction I must remind myself that I have been asked to exercise a discretionary power. Such a discretion is to be judicially exercised based on well-known principles.

I have to remember that the application is only against the 3rd to 7th defendants, members of an Election Commission. It has not ben asked for against the 1st and 2nd defendants. Nonetheless, as pointed out by their Counsel, Mr. Lester, in submission, if the injunction is granted in substance, though not in form, it would have the effect of a mandatory injunction against them to which I agree and it cannot be more clear. What I must also remember is in this application I am far from trying this substantive matter and that being so I must refrain from saying which has the effect of pronouncing any judgment on the issues being discussed which must be done and can only be done when these issues are properly tried. In other words I am not to prejudge the issue.

What has the plaintiff to show if he was to succeed in his application for this injunction? In *American Cynamid* case he has to show that the claim is not frivolous or vexatious and there are serious questions to be tried.

According to plaintiffs submission the first question he posed is whether in dissolving the Assembly the 1st defendant had to act on advice or had a discretion in the matter. The second question the plaintiff alleged to be triable is that if the defendant has a discretion whether to accede to a request to dissolve but instead acted on advice then it becomes a case of abdication or surrender of discretion.

To my mind the answer to the two above questions lies in the interpretation of the relevant Articles. I find as a fact that from the affidavits of 1st defendant, enclosure (7) and 2nd defendant, enclosure (9) there was advice and request to have the Legislative Assembly of the State of Sabah dissolved. 1st defendant deposed that he used his discretion and acted independently. It cannot be denied that the 1st defendant can exercise his discretion to withhold consent under Article 10(2) of the Sabah Constitution. The Article plainly speaks for itself. Is the 1st defendant to agree right away if there was advice or a request to have the Assembly dissolved? If he is then it can be said he has no discretion but Article 10(2) says so plainly he has a discretion to withhold consent. In my view the proper construction to be put to it would be he would have to consider, as he is invested with that power to do, whether to agree or to withhold consent. In his search for that decision he is of course not debarred from consulting anyone and obtaining the best advice and that in doing that consultation and obtaining that advice, 1st defendant in no way abdicate or surrender that discretion. The decision will still be his and his alone. The people he consults do not decide for him and how can it be said he surrendered or abdicated. On the analogy of a Court proceeding when one calls for expert witnesses they do not substitute the Court it is the Court that makes the decision.

As for the third question whether the 1st defendant is obliged to act on advice, this I have answered in my consideration of the second question and since the 1st defendant was not obliged the other part of the question does not arise.

Plaintiff also says there is triable issue in the fourth ground advanced by him in that as the question as to who is the real Chief Minister is presently being considered by a judicial power of the Federation (judgment due to be delivered on 15 April 1986), the dissolution being an Executive act, according to the plaintiff there is a triable issue that the dissolution is an encroachment of judicial powers.

Is the dissolution of the State Legislative Assembly of Sabah an Executive act? According to the majority view of this case, *Cormack v. Cope & Anor.* [1974] 131 CLR 432 (*supra*), it is Legislative. In that case Stephen J, at p. 471 said:

> ... but I may say that I would regard the acts of the Governor-General, undertaken in pursuance of s. 57, in dissolving both Houses and in convening a joint sitting as different in character from the familiar Executive acts of the Governor-General in Council which were said by the plaintiffs to be analogous and which were relied upon in that way as justifying judicial intervention in this instance. Both the act of dissolving both Houses and that of convening a joint sitting are undertaken not much in the exercise of the Executive power vested by s. 61 as in performance of a power conferred by s. 57 upon His Excellency as *persona designata* and inextricably involved in a Legislative process ... s. 57 lays down a complex procedure lying well within the ambit of Legislative process...

Following this authority I am satisfied that dissolution of the Legislative Assembly of Sabah by the 1st defendant under Article 21(2) of the State Constitution is a Legislative act and not an Executive act and that is consistent with the 1st defendant's position in Sabah Constitution, Article 13 which provides that the Legislature of the State shall consist of the 1st defendant, the Legislative Assembly. If I am right in holding that the act of dissolution is a Legislative act in no way can the Court intervene and that there is therefore no triable issue that there was encroachment. I have but to agree with the submission of Counsel for the 1st and 2nd defendants that Datuk Justice Tan Chiaw Thong's Court and the 1st defendant were proceeding in each other's sphere undeniably in this case with the unfortunate result that if the plaintiff, in Datuk Tan Chiaw Thong J's Court, be successful he may be robbed of the fruits of that judgment but most important consideration to remember being that in no way affect the validity of the 1st defendant's proclamation of dissolving the Assembly which is valid and cannot be interfered with by any Court injunction. (*Cormack v. Cope, supra*). Having held that the 1st defendant's dissolution was an act in his own sphere it is then unnecessary to dwell on the fifth reason of the plaintiff whether the Election Commission is under a constitutional duty to act upon the proclamation. The answer can only be that the 3rd to 7th defendants have no choice but to act.

It is my decision therefore that there are no serious triable issues to go to trial for reasons given above. In the exercise of my discretion I therefore hold that no interlocutory injunction be issued against the 3rd -7th defendants. In case that I should be in error in my above finding that there are no serious triable issues I proceed to consider whether or not I should issue an interlocutory injunction against the 3rd - 7th defendants on the balance of convenience. In whose favour does the balance of convenience lie?

In answering this question I am satisfied that the present case falls in one of the "special" or "special factor" cases that qualify or is an exception to the *American Cynamid* principles. I say so because of the time factor of 90 days within which election is to be held under Article 21(4) of the State Constitution following the dissolution of the Assembly and also the issue of the right Chief Minister, in this originating summons, which happens to be also the litigated issue, the subject matter of Civil Suit No.K. 467 of 1985. Although the decision in Civil Suit K. 467/85 will be delivered on 15 April 1986 it is unrealistic to say that the issue

will be or can be resolved within the 90 days bearing in mind that trial took 3½ months and with records of 1000 pages of notes of evidence and 500 pages of written submission. It is not unreasonable to expect the decision on 15 April 1986 would not end there and on appeal the records would have to be prepared and got ready. The Court would have to take judicial notice that that issue will not be resolved within the 90 days allowed to the Election Commission to hold the elections. In the meantime if the injunction is granted against the 3rd to 7th defendants they will be dragged in uncertainty. If the plaintiff fails the clear result will be the 1st and 2nd defendants and the people of Sabah would have lost the opportunity of taking part in a lawful election. It would give the plaintiff the relief that he would be able to obtain in the main action.

In this connection it may be relevant to consider the balance of convenience following the test of *Smith v. Inner London Education Authority* [1978] 1 All ER 411 on the need to weigh public interest since the plaintiff is seeking an injunction against the 3rd - 7th defendants, members of a public authority. The injunction although against them in substance affects the 1st and 2nd defendants, the exercise of a discretionary power under the State Constitution by the 1st defendant. In this case it may also be relevant to consider the prospect of the plaintiff succeeding. It is a correct statement I think, that the proclamation, until it is finally declared null and void, is not likely to be so declared in 90 days as stated above, has to be presumed valid as was stated by Lord Diplock in *Hoffman-La Roche v. Secretary of State for Trade & Industry* [1975] AC 295. That being the case the chance of the plaintiff succeeding in the main action in my view is slim. That being so the plaintiff therefore cannot show that he has a real prospect of success. The interest of the public therefore outweigh and this application can only result in refusal to grant the relief sought for.

As my view of the proclamation is that it is *prima facie* valid, until it is declared otherwise, in the face of that finding the clear duty of the Election Commission can only be to hold an election within the prescribed period. Since it is the clear duty of 3rd to 7th defendants what reason can the Court give for issuing an order preventing the 3rd to 7th defendants from performing their clear constitutional duty? In the public interest or in the interest of justice I exercise my discretion and refuse to issue an injunction against the 3rd to 7th defendants.

If I am still in error the next question will be has the Court the jurisdiction to issue this injunction against the 3rd to 7th defendants? That leads me to consider whether the 3rd to 7th defendants are officers of the government. Miss Mary Lim, Counsel for the 3rd to 7th defendants, citing various authorities contended they are and therefore under s. 29(2) of the Government Proceedings Ordinance 1956 no injunction could be given against them as the effect would be giving the plaintiff relief which he could not have obtained against the government. Mr. Sri Ram, Counsel for plaintiff, contended they are not also after citing several provisions of the Federal Constitution. Alternatively, even if they are so on the authority of *Tengku Haji Jaafar v. Government of the State of Pahang* [1978] 2 MLJ 105 nonetheless injunction can be granted.

I rule they are officers of government and in my view they cannot be otherwise. The slight confusion occurs because the statute creating that body or department have given them certain privileges and restrict the appointees to certain category of persons that seem to set them apart from members of the public service. That the funds they utilise be charged on the Consolidated Fund is to give them a certain degree of independence so that their salary would not be subject to the discussion of Parliament unless the Act which created them is properly under discussion. Stripped of all that they are officers in the employ of the Federal Government. The definition of "officer" in the Government Proceedings Ordinance in relation

to a government includes a person in the permanent or temporary employment of such government. It cannot be denied that these 3rd to 7th defendants are in the employment of the Federal Government. In my view there cannot be any other interpretation as their salaries are paid by the government.

An injunction has been asked for when none can be given. For reasons I have stated above, I exercise my discretion that no injunction can be granted against the 3rd to 7th defendants and I therefore dismiss the plaintiff's application for injunction against 3rd to 7th defendants with costs.

Also found at [1988] 1 CLJ 389